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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CHRISTINE STELTZNER et al., as
Trustees, etc.,

Plaintiffs and Respondents,

v.

MARY FOGARTY SAMSON,

Defendant and Appellant.

A132670

(Napa County Super. Ct.
No. 26-55921)

BACKGROUND

Mary Fogarty Samson, an objector in a trust dispute, appeals from a Napa County Superior Court order granting in part trustees' petition for declaratory relief. Ms. Samson argues, and we agree, that the trial court granted the trustees' petition without giving her proper notice that it intended to rule on the merits of the petition at the hearing on her demurrer. Appellant was deprived of the right of a hearing in which to present objections. Therefore, we will reverse and remand the matter for further proceedings.

FACTS AND PROCEDURE¹

This appeal stems from a dispute between siblings and heirs over their father's disposition of real property before his death in May of 2010. The controversy was succinctly summarized by the tentative ruling on Samson's demurrer as follows: In a separate action, "Mary Samson is suing the trustees for quiet title to real property on the ground the quitclaim deeds signed by decedent were obtained through undue influence. These quitclaim deeds provided the property of the trust. In the current action, petitioners are seeking a declaration that the trust is valid and that record title to the subject property is vested in the trust. . . ."

The First Action

Ms. Samson filed her second amended complaint to quiet title and for declaratory relief against the Thomas Fogarty Trust, Trustees Christine (Fogarty) Steltzner and Thomas Fogarty, and other beneficiaries of the trust, on October 29, 2010. Defendants answered the complaint on November 15, 2010. As of April 5, 2010, a mandatory settlement conference in that matter was scheduled for June 3, 2011.

The Second Action

In the meantime, on April 15, 2011, trustees Steltzner and Fogarty filed a "Petition of Trustees for Order Determining Existence of Trust, for Order Precluding Trust Contest After Expiration of Statutory Time to Contest, and for Order Confirming Trust Property

¹ We set forth an abbreviated summary of the facts in the light most favorable to the respondent and in support of the judgment or orders from which the appeal is taken. (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925–926.) However, respondents—here, the trustees—have failed to file a responsive brief. "Although it is the appellant's duty to show error, the respondent has a corresponding obligation to aid the appellate court in sustaining the judgment or order. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 612, p. 644.) We may, in our discretion, treat respondents' failure to file a brief as an acknowledgement that the appeal is well taken and reverse the trial court's orders. [Citations.]" (*Goldstein v. Barak Construction* (2008) 164 Cal.App.4th 845, 849, fn. 1.) However, we have examined the record and reviewed it for reversible error. (See Cal. Rules of Court, rule 8.220(a)(2).)

and Directing Its Continued Management,” to be heard on May 18, 2011. Samson filed a demurrer to the trustees’ petition on May 2, 2011, asserting several grounds.

On May 18, 2011, trustees’ petition came on for hearing. By minute order dated the same day, the court adopted its tentative ruling on the Samson demurrer and ordered: “A demurrer to the petition has been set for hearing on May 31, 2011. The matter is continued to that date. . . .”

The tentative ruling for May 31, 2011 sustained the demurrer “as to the petitions [sic] claims for declaratory relief as to trust contests” inasmuch as the petition presented “no actual controversy in this regard for the court’s determination.” Petitioners were granted 10 days leave to amend. The demurrer was “overruled in all other respects.” Specifically, the court ruled that the issues raised in the quiet title action were related to, but not the same as the issues in the petition, and therefore, abatement of the petition was not appropriate. On its own motion, the court decided to consolidate the two actions to “allow the related issues to be tried together by the same court and prevent a conflict of decisions.”

As to the “trustees’ petition for order determining existence of trust, etc.,” the tentative ruling stated: “Appearance Required: The petition is not yet at issue in light of the court’s ruling on the demurrer. *The hearing on the petition set for May 31, 2011, shall be taken off calendar.* The parties’ appearance is required, however, to discuss re-setting the hearing on the petition in coordination with the trial in the consolidated [quiet title] case.” (Italics added.)

On May 31, 2011, the matter was assigned to a judge other than the one who issued the tentative ruling and was continued to June 3, 2011. On June 3, 2011, after full discussion of the demurrer between the court and all the parties’ representatives, the court modified the tentative ruling in that it declined to order consolidation of the petition with the quiet title action. As modified, the court affirmed the tentative ruling insofar as it denied Samson’s plea for abatement. The court, on its own, proceeded to grant the petition on the merits, indicating “there were no timely objections to [the petition].” Counsel objected that his demurrer stayed his time to respond. The court disagreed and,

over counsel's objections, reaffirmed its view that "there was no opposition." An order sustaining the demurrer in part, granting leave to amend, and overruling the balance of the demurrer, was entered June 15, 2011. The order also granted the trustees' petition in four significant ways. Samson timely appeals from the order.²

DISCUSSION

Samson contends the trial court erred by granting the petition on the merits without fair notice and in derogation of her due process right to be heard, instead of abating the probate action pending resolution of the quiet title action. "The standard of review for an order overruling a demurrer is de novo. The reviewing court accepts as true all facts properly pleaded in the complaint in order to determine whether the demurrer should be overruled." (*Casterson v. Superior Court* (2002) 101 Cal.App.4th 177, 182–183.) However, we need not decide whether the court erred in its resolution of the merits of the petition, because we agree that the trial court deprived Samson of the right to be heard after proper notice. In our view, the critical fact is that the controlling tentative ruling plainly stated that the petition was "not yet at issue in light of the court's ruling on the demurrer," and that "[t]he hearing on the petition set for May 31, 2011, shall be taken off calendar."

By minute order dated May 18, 2011, the court adopted the tentative ruling. That made the tentative ruling an order of the court. "An order is a 'direction of a court or judge, made or entered in writing,' other than a judgment. (C.C.P. 1003; see *Passavanti v. Williams* (1990) 225 C.A.3d 1602, 1605, 275 C.R. 887 ['another way of defining an order is the court's written ruling on a motion'; orders distinguished from judgments]; C.J.E.R., Judges Benchbook, Civil Proceedings: Before Trial 2d, § 6.53 et seq.)." (6

² An order overruling a demurrer is not directly appealable, but may be reviewed on appeal from the final judgment. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 912–913.) The record demonstrates that the court actually granted the trustees' petition on the merits in substantial part. Inasmuch as the order finally disposes of all the issues between the parties in the petition action, we deem it a final judgment for appeal purposes. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698.) (See also Probate Code § 1300.)

Witkin, Cal. Proc. (5th ed. 2008) Proceedings Without Trial, § 44, p. 466.) In light of the court's order stating the merits of the petition were *off calendar* at the next hearing, the court abused its discretion in ruling on the merits, whether or not Samson had made an objection prior to the hearing,³ because she had *no notice* that the court would proceed directly from the ruling on the demurrer to a ruling on the merits of the petition. The procedures employed did not comport with due process, and did not comply with the requirements of the Probate Code. (Cf. *Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 208 [failure to afford notice and opportunity to be heard].)

CONCLUSION

The trial court abused its discretion in ruling on the merits of the trustees' petition without giving Samson a noticed opportunity to be heard.

³ Probate Code section 1043 provides: “(a) An interested person may appear and make a response or objection in writing at or before the hearing. [¶] (b) An interested person may appear and make a response or objection orally at the hearing. The court in its discretion shall either hear and determine the response or objection at the hearing, or grant a continuance for the purpose of allowing a response or objection to be made in writing. [¶] (c) A request for a continuance for the purpose of making a written response or objection shall not itself be considered as a response or objection, nor shall the failure to make a response or objection during the time allowed be considered as a response or objection.”

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to reinstate the petition.

Marchiano, P.J.

We concur:

Dondero, J.

Banke, J.